FILED
FEB 26 1991
OFFICE OF THE CLERK

90-1436

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

IN RE: FREDERICK J. DALEY LTD.,

Petitioner,

vs.

LOUIS W. SULLIVAN, M.D.,
Secretary of Health and Human Services,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

DORIE BUDLOW
Counsel of Record
FREDERICK J. DALEY LTD.
727 South Dearborn Street
Suite 613
Chicago, Illinois 60605
(312) 987-9807

Attorney for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED FOR REVIEW

1. Whether, under the Equal Access to Justice Act, 28 U.S.C. sec. 2412(d)(1)(A) and (d)(2)(D), the government's "position" can be construed as being an argument on which it prevailed in the underlying litigation.

2. Whether the Seventh Circuit Court of Appeals' interpretation and application of the language in the EAJA, 28 U.S.C. sec. 2412(d)(1)(A), that the Secretary's position must be "substantially justified" was consistent with this court's decision in *Pierce v. Underwood*, 487 U.S. 552, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988) and whether the Seventh Circuit Court of Appeals committed an error of law in holding that the Secretary may show his position was substantially justified either "in fact or in law."

3. Whether the District Court's order denying attorney fees under the Equal Access to Justice Act was an abuse of discretion where the court did not consider the legal errors made by the Secretary at the administrative level and in court.

PARTIES

Plaintiff in the case below was Robert Hadley. Defendant is Dr. Louis Sullivan, in his capacity as Secretary of the Department of Health and Human Services. "Daley" is attorney Frederick J. Daley who represented Plaintiff before the Social Security Administration and in court and who presented a Motion for Attorney Fees Under the Equal Access to Justice Act, which is the subject of the present Petition. Counsel learned on February 19, 1991 that Hadley died on August 15, 1990. Mr. Hadley did not have a personal estate and therefore no personal representative was appointed on account of his death. The Equal Access to Justice Act provides that attorney fees and other expenses may be paid to "a prevailing party." *See infra* page 3. In actuality, payment is made to the attorney representing the Plaintiff since the attorney fees come from a separate fund not related to Plaintiff's social security benefits. Neither Plaintiff nor his estate would be liable for the fees and expenses which are the subject of this Petition. Neither would Plaintiff nor his estate have a claim on the attorney fees and expenses his attorney is seeking under the EAJA. Since the attorney is the "real party in interest," attorney Frederick J. Daley is being substituted for Plaintiff, Robert Hadley, in the present Petition.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
ADMINISTRATIVE AND COURT DECISIONS	1
JURISDICTION	2
STATUTES UNDER REVIEW	3
STATEMENT OF THE CASE	4
ARGUMENT	9
APPENDIX	App. 1

TABLE OF AUTHORITIES

Cases	PAGE
Baker v. Bowen, 697 F. Supp. 430 (D. Wyo. 1988) ..	15
Burton v. Bowen, 711 F. Supp. 212 (E.D. Pa. 1989) ..	15
Bunn v. Bowen, 637 F. Supp. 464 (E.D. N.C. 1986)..	15
Citizens Council of Delaware County v. Brinegar, 741 F.2d 584 (3rd Cir. 1984)	10
Gallant v. Heckler, 753 F.2d 1450 (9th Cir. 1984) ..	14
Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L.Ed.2d 406 (1983)	9
Holden v. Heckler, 615 F. Supp. 686 (N.D. Ohio 1985)	9
Lichter v. Bowen, 814 F.2d 430 (7th Cir. 1987) ..	7
Pierce v. Underwood, 487 U.S. 552, 108 S. Ct. 2541, 101 L.Ed.2d 490 (1988)	9, 10, 11, 14, 15
Roberts v. Heckler, 636 F. Supp. 136 (N.D. Ill. 1986)	15
Stein v. Sullivan, 892 F.2d 43 (7th Cir. 1989) ..	14
Switzer v. Heckler, 742 F.2d 382 (7th Cir. 1984) ..	14
Wedra v. Thomas, 623 F. Supp. 272 (S.D. N.Y. 1985)	9
Whitney v. Schweiker, 695 F.2d 784 (7th Cir. 1982) ..	14

Statutes	
28 U.S.C. sec. 2412(d)(1)(A)	3
28 U.S.C. sec. 2412(d)(2)(D)	3

Regulations

20 C.F.R. Part 404, Subpart P, Appendix I, Listing 12.05 ..... 4, 5, 7, 9

20 C.F.R. Part 404, Subpart P, Appendix I, Listing 12.09 4

Rulings

Social Security Ruling (SSR) 83-20 *reprinted in* [February 1983 to December 1983 Transfer Binder] *Unemploy. Insur. Repts.* (CCH), para. 14,541 ..... 6, 7, 8, 12, 13, 16

ADMINISTRATIVE AND COURT DECISIONS

On July 30, 1987, Administrative Law Judge ("ALJ") John L. Mondi issued a written decision on Plaintiff's disability applications under Titles II and XVI of the Social Security Act, finding Plaintiff disabled as of February 13, 1987. Plaintiff requested review of the disability onset date with the Secretary's Appeals Council. On May 3, 1988, the Appeals Council affirmed the disability onset date found by the ALJ. Plaintiff thereafter commenced an action in the United States District Court for judicial review of the Secretary's final decision. Plaintiff and the Secretary filed cross-motions for Summary Judgment. In unpublished decisions, the District Court, Judge William T. Hart presiding, determined the Secretary's disability onset date of February 13, 1987 was not supported by substantial evidence. The court determined the evidence supported the onset date alleged by Plaintiff, January 15, 1985, and ordered that the case be remanded to the Secretary for the calculation and payment of benefits. *Hadley v. Sullivan*, No. 88 C 5773 (N.D. Ill. February 24, 1989). On motion of the Secretary to Alter or Amend Judgment, Judge Hart granted in part the Secretary's motion and denied it in part but affirmed his previous decision finding Plaintiff entitled to disability as of January 15, 1985. *Hadley v. Sullivan*, No. 88 C 5773 (N.D. Ill. May 24, 1989). Plaintiff then filed a Motion for Attorney Fees Under the Equal Access to Justice Act, 28 U.S.C. sec. 2412(d)(1)(A), alleging, *inter alia*, that the government's position was not substantially justified. The Secretary contested the motion arguing that his position was substantially justified. The District Court denied Plaintiff's mo-

tion for attorney fees. *Hadley v. Sullivan*, No. 88 C 5773 (December 7, 1989). Thereafter Plaintiff filed an appeal of the order denying attorney fees with the Seventh Circuit Court of Appeals. In unpublished opinions, the Seventh Circuit affirmed the District Court's denial of attorney fees and denied Plaintiff's timely Petition for Rehearing with Suggestion for Rehearing *In Banc*. *Hadley v. Sullivan*, No. 90-1291 (7th Cir. October 29, 1990); *Hadley v. Sullivan*, (7th Cir. November 28, 1990). The government filed a motion to publish the decision affirming the order of the District Court. This motion was denied. *Hadley v. Sullivan*, No. 90-1291 (7th Cir. November 29, 1990).

JURISDICTION

Plaintiff seeks to have this Court review the Circuit Court's order of October 29, 1990, which affirmed the District Court's denial of attorney fees under the Equal Access to Justice Act. Plaintiff filed a timely Petition for Rehearing with Suggestion for Rehearing *In Banc*. This Petition was denied on November 28, 1990. Petitioner brings this Petition pursuant to 28 U.S.C. sec. 1254(1).

STATUTES UNDER REVIEW

The Equal Access to Justice Act, 28 U.S.C. sec. 2412(d)(1)(A) provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. sec. 2412(d)(2)(D) states:

> 'position of the United States' means in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings.

STATEMENT OF THE CASE

Plaintiff applied for disability insurance benefits and Supplemental Security Income ("SSI") under sections 223, 216(i) and 1614(a)(3)(A) of the Social Security Act on April 11, 1986, alleging disability since January 15, 1985. Plaintiff's counsel referred him for psychological testing based on information that Hadley had a drinking problem. Testing was performed by Dr. George Gentry, a psychologist, on February 13, 1987. Among the tests administered was the Wechsler Adult Intelligence Scale-Revised (WAIS-R) which measured Plaintiff's intellectual functioning (I.Q.). At his administrative hearing, counsel argued that Plaintiff was suffering from several mental impairments including mental retardation, which would meet the Secretary's Listing of Impairments, 20 C.F.R. Part 404, Subpart P, Appendix I, ("Listings") at 12.05, Mental Retardation and Autism, as well as substance abuse (alcoholism). In order to show that Plaintiff met Listing 12.05, the mental retardation must be developmental, arise before the age of 22. In a written decision dated July 30, 1987, the ALJ found Plaintiff was disabled commencing February 13, 1987 due to an organic mental disorder under Listing 12.02 resulting from substance abuse which met the Secretary's Listings at 12.09. February 13, 1987 was the date of Dr. Gentry's psychological testing. Prior to this date, however, the ALJ determined Plaintiff was not disabled because he had the mental residual functional capacity for simple one and two-step instructions and could perform unskilled work at the medium exertional level. The ALJ relied on two consultative physical examinations Plaintiff underwent at the request of the Social Security Administration in establishing onset as of February 13, 1987. These examinations were performed by Dr. Mark Freed on April 28,

1986 and Dr. Ben Carasso on August 11, 1986. As part of these examinations, Plaintiff was given a "mental status examination" in which it was found that Plaintiff could perform calculations, could recite the similarity between an apple and an orange and knew who the President and Mayor of Chicago were. He exhibited appropriate behavior and his memory for remote and recent events was "intact." The ALJ also relied on a post-hearing psychiatric examination performed by Dr. Mortimer Gross on April 29, 1987. Dr. Gross concluded that Plaintiff was suffering from chronic alcoholism with organic brain syndrome and considerable cognitive deterioration. With reference to Plaintiff's I.Q. scores, Dr. Gross stated it was possible that Plaintiff was mentally retarded to begin with, however, based on his reported completion of the eighth grade in school, it was more likely the scores represented a deterioration from drinking. The ALJ rejected Plaintiff's argument that he met Listing 12.05 because Plaintiff's mental retardation was not developmental but resulted from organic brain damage stemming from his years of alcohol abuse.

In support of his Request for Review of the disability onset date, which was filed with the Appeals Council, Plaintiff solicited Dr. Gentry's opinion as to onset and specifically as to whether Plaintiff's low I.Q. was developmental (existed before the age of 22 as set forth under Listing 12.05) or resulted only from Plaintiff's history of alcohol abuse. Dr. Gentry responded in a Memorandum dated August 18, 1987, that because the I.Q. subtest scores were uniformly low, his low I.Q. was developmental. A developmental disability was also supported by Hadley's illiteracy (he could read at only the beginning of the second grade level) and the learning difficulties he experienced as a child. It was Dr. Gentry's opinion that Hadley would have been functioning at the same level several

years prior to the date of testing both with respect to his low IQ and the extent of brain damage resulting from alcoholism. The Appeals Council rejected Dr. Gentry's opinion, finding that the medical evidence did not establish a mental impairment prior to the disability onset date found by the ALJ.

The Secretary argued in court that the disability onset date was supported by substantial evidence, specifically that "ALJ Mondi properly determined that Plaintiff's disability stemmed from an alcoholic dementia, and not from mental retardation" (Defendant's Memorandum In Support of Motion for Summary Judgment, p. 5); that Plaintiff's chronic alcoholism and chronic brain syndrome, while progressive, became disabling sometime between Dr. Carasso's examination in August 1986 and Dr. Gentry's psychological testing on February 13, 1987. Further, that "[w]hile the Secretary does not assert that disability actually occurred on the day of February 13, 1987, the fact that onset was observed to have manifested for the first time during the psychological testing, makes the choice of February 13, 1987 logical and acceptable" (Defendant's Memorandum In Support of Motion for Summary Judgment, pp. 16-17). According to the Secretary, because the record "clearly indicated the time of onset," the ALJ did not have to call on a medical advisor to determine onset under Social Security Ruling 83-20[1] because there was

---

[1] Social Security Ruling 83-20 *reprinted in* [February 1983 to December 1983 Transfer Binder] *Unemploy. Insur. Repts.* (CCH), para. 14,541, provides that in the case of:

> "slowly progressive impairments, it is sometimes impossible to obtain medical evidence establishing the precise date an impairment became disabling. Determining the proper onset date is particularly difficult, when, for example, the alleged onset and the date last worked are far in the past and adequate

(Footnote continued on following page)

"substantial medical and other evidence supporting ALJ Mondi's assignment of the onset date" (Defendant's Memorandum In Support of Motion for Summary Judgment, pp. 17-18). In his February 24, 1989 decision, Judge Hart, quoting from *Lichter v. Bowen*, 814 F. 2d 430 (7th Cir. 1987), stated that an ALJ may not simply rely on the date a diagnosis is made in determining disability onset. The court held the ALJ was required to follow Social Security Ruling 83-20 in determining onset but failed to do so. Specifically the court found that because Plaintiff's impairment was progressive and there was no medical evidence as to the precise disability onset date, the ALJ was required to call on the services of a medical advisor to assist the ALJ in determining onset. The District Court found the Secretary's argument that Plaintiff did not meet Listing 12.05 (mental retardation) to be "probably supported by substantial evidence, but the issue need not be conclusively resolved." *Hadley v. Sullivan*, No. 88 C 5773 (N.D. Ill. February 24, 1989), at App. 9. Instead, he referred to Dr. Gentry's August 18, 1987 Memorandum stating it was the only direct evidence of onset and, given the test results as well as the personal history obtained from Plaintiff and the testimony of his landlord, found Plaintiff's condition existed at a disabling level of severity as early as Plaintiff's alleged onset date, January 15, 1985. Judge Hart found the only evidence inconsistent with this onset

---

[1] *continued*

medical records are not available. In such cases, it will be necessary to infer the onset date from the medical and other evidence that describe the history and symptomatology of the disease process." Where onset must be inferred, a determination of onset "depends on an informed judgment of the facts in the particular case. This judgment, however, must have a legitimate medical basis. At the hearing, the administrative law judge (ALJ) should call on the services of a medical advisor when onset must be inferred."

date were the reports of the consultative examining internists, Dr. Carasso and Dr. Freed; however, given Dr. Gentry's report and the credible testimony of Plaintiff and the landlord, these examinations were not a sufficient basis on which to reject Dr. Gentry's opinion of onset. In his Motion to Alter or Amend Judgment, Defendant objected to the court's characterization of Dr. Gentry as a "medical advisor" within the meaning of this phrase in Ruling 83-20. The court acknowledged that while it may have been inaccurate in describing Dr. Gentry as a medical advisor, the psychologist's opinion as to onset together with the other evidence of record "pointed to only one conclusion, an onset date of January 15, 1985." *Hadley v. Sullivan*, No. 88 C 5773 (N.D. Ill. May 24, 1989).

On December 7, 1989, Judge Hart denied Plaintiff's motion for attorney fees finding that "whether or not the evidence pointed to only one conclusion, a necessity for the holding reached, was a close question." This meant the "government's position" was substantially justified. *Hadley v. Sullivan*, No. 88 C 5773 (N.D. Ill. December 7, 1989) at App. 6.

Plaintiff appealed this decision to the Seventh Circuit Court of Appeals pursuant to 28 U.S.C. sec. 1291. The Circuit Court, in affirming the judgment of the District Court, stated that "[t]he District Court must deny benefits under EAJA if it finds that a reasonable argument can be made in law or fact." *Hadley v. Sullivan*, No. 90-1291 (7th Cir. October 29, 1990) at App. 3. The Court found that "reasonable arguments could be made in support of the ALJ's decision" and that the argument set forth by the Secretary "is not without support in law or fact." *Id.* at App. 4. According to the Seventh Circuit, "[t]he Secretary was not without substantial justification in contending that the evidence was sufficient to establish the onset date." *Id.*

ARGUMENT

In the Secretary's view, where its "position" in a "major part of the litigation is reasonable even if the government's decision is ultimately reversed," it has shown it was substantially justified (Reply Brief of the Defendant-Appellee, p. 24, n. 13). The Secretary bases this rationale on the language in *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 2550, 101 L.Ed.2d 490, 504 (1988), wherein the court stated that substantial justification means that the government's position is reasonable "in substance or in the main." Plaintiff believes this language in *Pierce* could not be construed as allowing the government to show its position was substantially justified based on an argument or arguments which, while comprising a substantial part of the litigation, did not affect the court's decision.

The EAJA does not define the word "position," however, it has been interpreted to mean the overall position of the government. *Holden v. Heckler*, 615 F. Supp. 686, 695 (N.D. Ohio 1985), citing *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L.Ed.2d 406 (1983). *See also Wedra v. Thomas*, 623 F. Supp. 272 (S.D. N.Y. 1985). The government's position includes the arguments made in support of the claim under review, however, the fact that the government prevails on one issue does not necessarily mean it was substantially justified. This is especially true where the argument was not crucial to the outcome of the case.

The District Court denied attorney fees because "a necessity" for the decision was a "close question." The only "close question" in this case was whether Plaintiff was suffering from mental retardation under Listing 12.05 in

which case he would have been disabled as of January 15, 1985. The ALJ found he was not. This issue was extensively briefed by the parties. The District Court determined the ALJ's finding was "probably" correct. However, as the court also found, resolution of this issue was not necessary to the disposition of the parties' motions for summary judgment. The Secretary's primary contention in court was that the onset date was supported by substantial evidence. This should be viewed as the Secretary's position for EAJA purposes. While the facts in the case may or may not have supported one or more of the ALJ's findings, the EAJA review centers on the "essential claims" not the arguments of the parties. *Citizens Council of Delaware County v. Brinegar*, 741 F.2d 584, 595 (3rd Cir. 1984). In this case, whether Plaintiff was suffering from life-long mental retardation did not resolve the disability onset question because Plaintiff had other impairments including organic brain damage and alcoholism which were characterized by symptoms unrelated to his intellectual capacity. To the extent that the dispute over whether Plaintiff's mental impairment was developmental entered into the District Court's decision to deny attorney fees, the Secretary's arguments on this issue do not, alone, show his position was substantially justified.

In *Pierce*, the court distinguished the thrust of the inquiry in the underlying litigation from that under the EAJA. The issue under the EAJA "will not be precisely the same as the merits; not what the law now is, but what the Government was substantially justified in believing it to have been." *Pierce* at 487 U.S. 561, 108 S. Ct. 2548, 101 L.Ed.2d 502. The *Pierce* court construed substantial justification in terms of the degree that would satisfy a reasonable person. Therefore the "reasonable person" standard must be used to assess the government's understanding, representation, and presentation of

what the law was. While the court in *Pierce* was reluctant to set forth specific guidelines to be used by the court, due to the discretionary nature of its inquiry under the EAJA, it did indicate the kind of factors which might be used in determining whether the government's position was reasonable including the stage of the proceedings at which the litigation was terminated, whether there was a settlement or an appeal on the merits, decisions in other cases on the same or similar issues in which the government was a party and, as was used in *Pierce*, the merits of the government's case. Including these factors in the EAJA review anticipates that the inquiry will be a more or less objective one, based not on what the government believed the law to be, but rather on what the government *reasonably* believed the law to be. What the government reasonably believed the law to be must satisfy a reasonable person, not necessarily the government, that its position was justified "in fact and in law."

Here, the Circuit Court reviewed one of the government's arguments in isolation and without reference to the case as a whole, determined the government had made a "reasonable argument" and concluded the Secretary was substantially justified. This approach was overly subjective. What the Secretary may have been justified in believing based on the facts and legal theory he presented in the underlying litigation would not necessarily satisfy a reasonable person in light of the facts as a whole and the opposing legal theories in the case. The argument addressed by the Seventh Circuit illustrates the problem with this approach.

The Secretary argued the 1986 examinations by Doctors Freed and Carasso constituted clear evidence of nondisability prior to February 1987 thereby relieving the ALJ of his obligation to infer onset and excusing him from calling on a medical advisor. It was this argument which

the Circuit Court labeled "reasonable" and sufficient to support the District Court's order denying attorney fees. If the 1986 examinations were viewed in isolation and if they constituted the only evidence in the case, the government may well have been justified in establishing onset in February 1987 without requiring the testimony of a medical advisor. However, this was not the only evidence in the case. The nature of Plaintiff's impairments as revealed by the testing and other information elicited by Dr. Gentry in February 1987 failed to support the government's theory that it did not have to follow Social Security Ruling 83-20 in establishing onset. The reason for this was three-fold. First, Plaintiff's impairments were progressive. The Secretary did not dispute Dr. Gentry's description of Plaintiff's impairments as "slow and cumulative." He also agreed with Dr. Gross' opinion that Plaintiff's impairments of alcohol abuse and organic brain syndrome were manifested by deterioration in intellectual and other mental functions. The very nature of these impairments, as well as the fact that they had become severe enough to meet one of the Secretary's listed impairments on February 13, 1987, demonstrates that Plaintiff's mental capacities must have been diminishing prior to February 13, 1987. Second, there was no medical evidence between August 1986 and February 1987 showing the severity of Plaintiff's mental impairments. Neither of the 1986 consultative examinations included the specific intellectual and neuropsychological testing administered by Dr. Gentry. Third, the testimony at the hearing which the ALJ found credible revealed Plaintiff had memory and other mental limitations prior to February 1987. These included limitations not addressed in the 1986 consultative examiners' reports such as Plaintiff's inability to travel alone, inability to complete tasks, frequent episodes of intoxication, and illiteracy. The progressive nature of the disease process, the absence of medical evidence showing

a "precise" disability onset date, and the manifestation of mental limitations which would affect Plaintiff's ability to work are precisely the factors which would require the ALJ to obtain the services of a medical advisor in determining onset under Social Security Ruling 83-20.

Viewed in isolation the reports of the two consultative physicians might have supported a finding that the claimant's impairments were not disabling prior to August 1986. Considering the other evidence, which even the Secretary did not dispute, relying on the two examinations did not justify his disregarding the directives of Social Security 83-20. The Circuit Court erred when it stated "[t]he Secretary was not without substantial justification in contending that the medical evidence did not establish January 1985 as the date of disability, because numerous medical examinations in 1986 indicated only slight mental impairments." *Hadley v. Sullivan*, No. 90-1291 (7th Cir. October 29, 1990), at App. 4. The Secretary's burden of proof was not to show that the January 1985 alleged onset date was not supported by substantial evidence but rather that the February 1987 onset date was supported by substantial evidence and was correct in law. This was an important distinction because the 1986 examinations could at most be relevant to the period before August 1986.

The Secretary offered no support whatsoever for his argument that the date of diagnosis can be used to establish onset where the claimant suffers from an impairment which is progressive in nature. The Secretary's argument that the medical evidence clearly pointed to a nondisabling impairment prior to February 1987 became even more tenuous after Dr. Gentry's August 18, 1987 Memorandum to the Appeals Council in which he stated that, given the length of Plaintiff's alcohol abuse and other factors, he would have tested the same in January 1985 as he did in February 1987.

The reasonableness of the government's position should not be judged only by what the government believed the facts to be. If one accepts the view of the Circuit Court, that substantial justification can be shown in either fact or law, the government could successfully show its position was justified by setting forth some fact or facts in support of its theory. In court, the Secretary usually follows the same rationale used by the ALJ and/or the Appeals Council at the administrative level. The propensity in social security disability cases for the ALJ and the Appeals Council to "pick and choose" among the evidence to support their conclusions has been addressed and criticized many times. *Stein v. Sullivan*, 892 F. 2d 43, 47 (7th Cir. 1989); *Switzer v. Heckler*, 742 F.2d 382 (7th Cir. 1984); *Gallant v. Heckler*, 753 F.2d 1450, 1455-56 (9th Cir. 1984); *Whitney v. Schweiker*, 695 F.2d 784, 788 (7th Cir. 1982). The facts the Secretary relies on to reach a conclusion in the disability case is often not a complete or fair reflection of the evidence as a whole. To allow the Secretary to rely on these same facts to show his position was substantially justified would be contrary to the intent of the EAJA which is to encourage individuals to resist unreasonable government action. Allowing the court to make a determination of the reasonableness of the government's position viewing those same facts in isolation is not the approach this court took in *Pierce* and it is not what the legislature intended when it required the government to show its position is reasonable in fact and law. *Pierce* at 487 U.S. 563-64, 108 S. Ct. 2543, 101 L.Ed.2d 503, citing from H.R. Conf. Rep. No. 96-1434, p. 22 (1980).[2] A showing of one or the other is insufficient.

---

[2] This report is reprinted in U.S. Code Cong. & Admin. News, 96th Cong. 2nd Sess. (1980), p. 5011: "After a prevailing party has submitted an application for an award, the burden of proving

(Footnote continued on following page)

In reviewing the District Court's order denying attorney fees, the Seventh Circuit failed to properly analyze the reasonableness of the government's position by permitting the Secretary to show substantial justification in a manner expressly contrary to the legislative history of the EAJA and to this court's construction of substantial justification in *Pierce v. Underwood*. The Court failed to review the reasonableness of the Secretary's disability onset date with reference to the merits of the government's case or any other factor which might have more objectively reflected the reasonableness of the government's position such as the legal errors made at the administrative level. The fact that Plaintiff's motion for summary judgment was granted resulting in an outright reversal of the Secretary's decision demonstrates that the few facts the Secretary relied on to show the onset date was substantially justified were not convincing given the evidence as a whole.

The District Court's order denying attorney fees constituted an abuse of discretion where the Secretary's actions at the administrative level were based on legal error. Where the Secretary commits an error of law by failing to follow his own regulations, substantial justification cannot be shown. *Burton v. Bowen*, 711 F. Supp. 212 (E.D. Pa. 1989); *Baker v. Bowen*, 697 F. Supp. 430 (D. Wyo. 1988); *Roberts v. Heckler*, 636 F. Supp. 136 (N.D. Ill. 1986) (ALJ failed to combine all claimant's impairments in considering whether she equalled a listing and failed to obtain an updated opinion of equivalency contrary to SSR 83-19); *Bunn v. Bowen*, 637 F. Supp. 464 (D.N.C. 1986)

---

[2] *continued*

that a fee award should not be made rests with the Government. The test of whether the Government's position is substantially justified is essentially one of reasonableness in law and fact."

(failure to follow proper analysis at Step 2). If the agency does not follow its own regulations when it determines disability onset and this error leads the court to conclude that the decision was not supported by substantial evidence, it would be difficult to imagine how the government could be substantially justified in arguing that it need not have followed the directives of its own rules. While the parties did dispute some issues, the evidence nevertheless would have required the ALJ to follow Social Security Ruling 83-20. The District Court's finding that the evidence pointed to only one conclusion is at odds with its determination that the Secretary's position was substantially justified. As was discussed above, the District Court may have relied on the "close" question of whether Plaintiff was mentally retarded in denying fees. As to the central issue, whether the Secretary's onset determination was supported by substantial evidence, it is clear the District Court considered legal error in the underlying litigation but unclear how legal error influenced, if at all, its determination under the EAJA. Therefore, to the extent that the District Court did not consider or did not properly consider the errors of law which occurred at the administrative level, the court's order denying attorney fees constitutes an abuse of discretion.

Respectfully submitted,

DORIE BUDLOW
Counsel of Record
FREDERICK J. DALEY LTD.
727 South Dearborn Street
Suite 613
Chicago, Illinois 60605
(312) 987-9807

Attorney for Petitioner

APPENDIX

INDEX TO APPENDIX

	APP. PAGE
Decision of the Seventh Circuit Court of Appeals, dated October 29, 1990, affirming the order of the District Court	1
Decision of the Seventh Circuit Court of Appeals, dated November 28, 1990, denying Plaintiff's Petition for Rehearing with Suggestion for Rehearing *In Banc*	5
Decision of the United States District Court dated December 7, 1989 denying Plaintiff's Motion for Attorney Fees Under the Equal Access to Justice Act	6
Decision of the United States District Court for the Northern District of Illinois dated February 24, 1989, granting Plaintiff's Motion for Summary Judgment and denying Defendant's Motion for Summary Judgment	7
Decision of the United States District Court for the Northern District of Illinois dated May 24, 1989 denying Defendant's Motion to Alter or Amend Judgment	13

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Submitted October 22, 1990[1]
October 29, 1990

BEFORE

Hon. William J. Bauer, Chief Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge

ROBERT HADLEY,	)	Appeal from the United
	)	States District Court for
Plaintiff-Appellant,	)	the Northern District
	)	of Illinois, Eastern
No. 90-1291 v.	)	Division
	)	
LOUIS W. SULLIVAN, M.D.,	)	No. 88 C 5773
Secretary of Health and	)	
Human Services,	)	William T. Hart, Judge.
	)	
Defendant-Appellee.	)	

ORDER

This appeal concerns the denial of attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. Sec.

[1] After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need for Oral Argument." *See* Fed. R. App. P. 34(a); Circuit Rule 34(f). Plaintiff-appellant has filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

2412(d)(1)(A), in a case for disability benefits under the Social Security Disability Benefits Reform Act. The central issue on appeal is whether the Secretary of Health and Human Services (the Secretary) was substantially justified under the EAJA in contesting the onset date of disability.

After a hearing at which lay and medical testimony was presented, the Administrative Law Judge (ALJ) found that Hadley suffered from organic mental disorder as a result of substance (alcohol) addiction, and awarded benefits to Hadley. The ALJ, however, determined the onset date of disability as February, 1987, rather than January 1985 as Hadley had contended. In arriving at that decision, the ALJ noted that the record did not document mental deterioration until the testing on February 13, 1987, and that an examination on August 11, 1986, indicated that Hadley's memory was intact and his behavior was appropriate. That decision was affirmed by the Appeals Council.

On appeal to the district court, the central issue was whether the onset date of disability was properly determined. The court held that the ALJ improperly calculated the onset date because Social Security Ruling 83-20 required the ALJ to "call on the services of a medical advisor" in cases in which no medical evidence established the precise onset date. The court reversed the case and remanded for an award of benefits as of the 1985 date because a medical report by Dr. Gentry, admitted as a supplement to the record before the appeals council, provided direct evidence of the onset date of disability. On a motion to alter or amend judgment, the court acknowledged that Dr. Gentry might not qualify as a "medical advisor" under SSR 83-20, but held that the evidence pointed to only conclusion regarding onset date, and that the relief granted was still appropriate.

The court denied, however, the subsequent motion for EAJA fees by Hadley. The court declared that the Secretary's position was substantially justified because the need for reversal was a close question. On appeal, Hadley asserts that the Secretary's position could not have been substantially justified because it was in violation of SSR 83-20.

The district court must deny benefits under EAJA if it finds that a reasonable argument can be made in law or fact. Furthermore, that decision by the district court can only be disturbed if the court abused its discretion. *McGuire v. Sullivan*, 873 F.2d 974, 977 (7th Cir. 1989). In this case, we are unable to conclude that the district court abused its discretion in denying benefits.

A position is substantially justified if it is justified to a degree that could satisfy a reasonable person. *Pierce v. Underwood*, 108 S.Ct. 2541 (1988). Analysis of the present case indicates that reasonable arguments could be made in support of the ALJ's decision. SSR 83-20 provides that the ALJ should call on the services of a medical advisor in cases in which the medical evidence of record does not establish the onset date of disability. Hadley argues that the ALJ violated that requirement by determining the onset date in the absence of direct medical evidence and without consulting a medical advisor, and that the Secretary should have known of that violation. The record, however, indicates that a number of doctors examined Hadley between January 1985 and 1987. Those examinations revealed declining mental ability, culminating in the examination on February 1987 upon which the ALJ relied to determine disability. The ALJ concluded that the examination failed to reveal a disabling condition prior to February 1987. Therefore, the ALJ essentially found that the medical evidence established the onset date. Because

the onset did not have to be inferred under that reasoning, the requirement of consulting a medical advisor was inapplicable. That argument is not without support in law or fact. Whether the medical evidence documenting the mental deterioration was sufficient to establish a disability date is subject to considerable argument. The Secretary was not without substantial justification in contending that the evidence was sufficient to establish the onset date.

Moreover, the district court ultimately did not rely on SSR 83-20 in its decision. The court held that the evidence, including Dr. Gentry's report, conclusively established the onset date as 1985. Based upon that conclusion, the court reversed the case and remanded it for the award of benefits. Therefore, the district court did not determine that a medical advisor had to be consulted once Dr. Gentry's supplemental report was submitted. The Secretary was not without substantial justification in contending that the medical evidence did not establish January 1985 as the date of disability, because numerous medical examinations in 1986 indicated only slight mental impairments. The district court did not abuse its discretion in concluding that the Secretary's position was substantially justified. Accordingly, the decision of the district court denying EAJA fees is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

November 28, 1990

BEFORE

Hon. William J. Bauer, Chief Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge

ROBERT HADLEY,	)	Appeal from the United
	)	States District Court for
Plaintiff-Appellant,	)	the Northern District
	)	of Illinois, Eastern
No. 90-1291 v.	)	Division
	)	
LOUIS W. SULLIVAN, M.D.,	)	No. 88 C 5773
Secretary of Health and	)	
Human Services,	)	William T. Hart, Judge.
	)	
Defendant-Appellee.	)	

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT HADLEY,	)	
	)	
Plaintiff,	)	No. 88 C 5773
	)	
v.	)	Dated:
	)	December 7, 1989
OTIS R. BOWEN, M.D.,	)	
Secretary of Health and	)	
Human Services,	)	
	)	
Defendant.	)	

The court's two prior orders in this case hold that the evidence points to only one conclusion and therefore the ALJ's decision was not supported by substantial evidence. Whether or not the evidence pointed only to one conclusion, a necessity for the holding reached, was a close question. The government's position, therefore, was substantially justified. Plaintiff is not entitled to attorney's fees under the Equal Access to Justice Act. IT IS THEREFORE ORDERED that plaintiff's motion for attorney's fees under the Equal Access to Justice Act is denied.

s/ William Hart

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT HADLEY,	)	
	)	
Plaintiff,	)	No. 88 C 5773
	)	
v.	)	Dated:
	)	February 24, 1989
OTIS R. BOWEN, M.D., Secretary of Health and Human Services,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

The dispute in this case concerns the onset date of Robert Hadley's disability for purposes of qualifying for disability insurance benefits and supplemental security income. The administrative law judge ("ALJ") found plaintiff to be disabled as of February 13, 1987 due to an organic mental disorder as a result of substance addiction that satisfied the severity level for Listing 12.09 which incorporates Listing 12.02. *See* 20 C.F.R. Part 404, Subpart P, App. 1 Secs. 12.02, 12.09 (1987). Plaintiff argues he should have been found disabled as of his alleged onset date of January 15, 1985.

The Seventh Circuit recently summarized the standards to apply in determining the onset date of a disability.

> Social Security Ruling 83-20 ("SSR 83-20") describes how the onset date of a disability should be determined. SSR 83-20, at 109 (C.E. 1983). SSR 83-20's explicit purpose is "[t]o state the policy and describe

> the relevant evidence to be considered when establishing the onset date of disability." *Id.* at 109. It states that the onset date for disabilities of traumatic origin is the date of the injury. In disabilities of non-traumatic origin, three factors are to be considered in determining the onset date: the applicant's allegations, work history, and medical and other evidence. SSR 83-20 describes the date alleged by the applicant as "[t]he starting point" in determining the onset date, *id.* at 110; that date "should be used if it is consistent with all the evidence available," *id.* at 111. Regarding work history, SSR 83-20 states that "[t]he day the impairment caused the individual to stop work is frequently of great significance in selecting the proper onset date." *Id.* at 110. Medical evidence is described as "the primary element in the onset determination," *id.*, and the date chosen "can never be inconsistent with the medical evidence of record," *id.* at 111. In cases where there is no medical evidence as to the precise onset date, but where the disabling impairment seems to have occurred prior to the date of the first recorded medical examination, the ALJ "should call on the services of a medical advisor" to help in making the necessary inferences. *Id.* Where no reasonable inference is possible based on the available evidence, "it may be necessary to explore other sources of documentation. Information may be obtained from family members, friends, and former employers to ascertain why medical evidence is not available for the pertinent period and to furnish additional evidence regarding the course of the individual's condition." *Id.* at 111-12.

Lichter v. Bowen, 814 F.2d 430, 434-35 (7th Cir. 1987). The ALJ cannot simply rely on the date of first diagnosis as the onset date. *See id.*; *Willbanks v. Secretary*, 847 F.2d 301, 304 (6th Cir. 1988) (per curiam).

There is medical evidence to support that plaintiff has been mentally retarded since childhood and medical evi-

dence to support that his organic mental disorder stemming from alcohol abuse had reached a disabling level of severity by January 1985. While acknowledging a possibility that mental retardation existed since childhood, Dr. Mortimer Gross, a psychiatrist, expressed the opinion that it was more likely that plaintiff's alcohol abuse caused his mental impairment. The ALJ's finding of no childhood mental retardation is probably supported by substantial evidence, but that issue need not be conclusively resolved. The ALJ's conclusion that the alcohol induced mental impairment became disabling as of February 13, 1987 is not supported by substantial evidence so it is unnecessary to consider any other issue raised by plaintiff.[1]

It is undisputed that plaintiff, who was born in 1942, began drinking at age 8 and had been suffering from chronic severe alcohol abuse for 25 to 30 years or more. Dr. George Gentry, a psychologist, examined plaintiff on February 13, 1987 and administered a number of psychological tests. Dr. Gentry determined plaintiff's full scale I.Q. was 58, which placed plaintiff in the category of mild retardation. He also found plaintiff was illiterate; had borderline impaired visual memory and perception; could not manage money; could not maintain his concentration, follow instructions, or follow directions; and had limited ability to interact socially. This examination was the principal basis of the ALJ's finding that February 13, 1987 was the onset date. Dr. Gross examined plaintiff on April 29, 1987 and also considered past medical reports including Dr. Gentry's

---

[1] It is actually the decision of the Appeals Council that is considered the decision of the Secretary and which this court reviews. *Bauzo v. Bowen*, 803 F.2d 917, 921-22 (7th Cir. 1986). Since the Appeals Council essentially adopted the reasoning of the ALJ, the court simplifies its presentation by generally referring directly to the ALJ's decision.

psychological report. At this examination, plaintiff again exhibited memory deficiencies and other impairments. Dr. Gross diagnosed plaintiff as having chronic alcoholism with organic brain syndrome and considerable deterioration. He expressed no opinion as to an onset date other than to conclude it was likely that Hadley's mental retardation was not congenital. On August 11, 1986, Dr. Ben Carasso, an internist, had examined plaintiff. As part of his examination, Dr. Carasso administered a mental status exam. He concluded plaintiff was fully oriented to person, place, and time and had intact recent and remote memory. The Appeals Council permitted plaintiff to supplement the record with a memorandum of Dr. Gentry. Dr. Gentry explained in that memorandum why the evidence indicated plaintiff had been mildly retarded since childhood. More pertinent to the present decision, he stated that mental deterioration from alcohol abuse is slow and cumulative. He opined that there would be no significant difference between the test results of February 13, 1987 and results if the same tests had been given several years earlier. Without discussion, the Appeals Council stated that opinion provided no basis for changing the ALJ's decision. The Secretary reasoned that Dr. Carasso's report as to mental orientation and intact memory on August 11, 1986 justified not finding severe mental impairment prior to February 13, 1987.[2]

---

[2] Before this court, the Secretary also argues that mental deterioration could have been accelerated by a June 1986 mugging in which plaintiff was hit on his head. That argument is rejected for a number of reasons. For one, there is no medical evidence that the head injury had any effect on plaintiff's mental capabilities. To the contrary, Dr. Carasso states the trauma caused no serious injury nor loss of consciousness. Moreover, there is absolutely no indication the ALJ or Appeals Council found the head

(Footnote continued on following page)

The Secretary is obliged to follow SSR 83-20, *see Lichter*, 814 F.2d at 434 n.5, but did not. Dr. Gentry's memorandum is the only direct evidence as to onset date. He states alcohol induced mental deterioration is a slow process and that plaintiff's February 1987 condition is not likely significantly different from his January 1985 condition. That conclusion is not inconsistent with Dr. Gross's report of the April 29, 1987 examination which refers to considerable intellectual and cognitive deterioration from alcoholism. The testimony of plaintiff and Tommy Newton, his friend and landlord, both of whom the ALJ found to be credible, is also consistent with finding the condition existed by January 1985. They testified as to plaintiff's general confusion, inability to care for himself, forgetfulness, inability to travel, inability to concentrate, and other behavior. The only evidence inconsistent with finding that the condition existed since January 1985 is the report of an internist as to a mental status exam. The results of that examination, however, are not consistent with the slow mental deterioration that chronic alcohol abuse causes, a medical fact supported by the record and conceded by the Secretary. In light of Dr. Gentry's memorandum, which is the only evidence as to onset date,[3] and in light of the testimony of plaintiff and Newton, which is also to be considered under SSR 83-20, the report of Dr.

---

[2] *continued*
trauma to be a cause of mental deterioration. Also, under SSR 83-20, such a finding would tend toward a finding of June 1986 as the onset date, not February 1987, since trauma caused impairments are generally considered to have started the date of the trauma.

[3] Under SSR 83-20, the ALJ should have called on the services of a medical advisor to help determine the onset date. Although the ALJ failed to do this, the Appeals Council admitted such evidence into the record, but failed to give it adequate weight.

Carasso is not substantial evidence for rejecting the January 1985 alleged onset date. The Secretary did not have adequate grounds for rejecting the medical advisor's[4] analysis of the onset date nor plaintiff's alleged onset date.

IT IS THEREFORE ORDERED that defendant's motion for leave to file surreply is granted. Plaintiff's motion for summary judgment is granted and defendant's motion for summary judgment is denied. This case is remanded to the Secretary with directions to award benefits based on an onset date of January 15, 1985.

ENTER:

/s/ William T. Hart
UNITED STATES DISTRICT JUDGE

Dated: FEBRUARY 24, 1989

[4] A licensed or certified psychologist is considered a medical expert under the regulations. *See* 20 C.F.R. Sec. 404.1513(a)(3).

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT HADLEY,	)	
	)	
Plaintiff,	)	No. 88 C 5773
	)	
v.	)	Dated:
	)	May 24, 1989
OTIS R. BOWEN, M.D., Secretary of Health and Human Services,	)	
	)	
Defendant.	)	

ORDER

In a memorandum opinion and order dated February 24, 1989, this court ordered this case remanded to the Secretary with directions to award benefits based on an onset date of January 15, 1985. Defendant timely moved to alter or amend judgment,[1] principally arguing that the court mischaracterized Dr. Gentry as a medical advisor and that the court should remand the case for a redetermination of the onset date after a medical advisor is appointed. As described below, the court amends the February 24 opinion, but reaches the same conclusion.

Defendant argues that Dr. Gentry was not a medical advisor since that term applies only to certain medical

[1] Defendant placed an incorrect case number on two of its filings. The court has corrected that numbering and the documents have been placed in the proper file.

experts designated by the Secretary. Defendant cites 20 C.F.R. Sec. 404.1526(c), but that regulation does not expressly define "medical advisor," nor does SSR 83-20. Plaintiff, however, does not argue that Dr. Gentry was a medical advisor so the court will assume that medical advisor is a term of art not encompassing Dr. Gentry's role in this case. Therefore, the February 24 opinion is amended to the extent it refers to Dr. Gentry as a medical advisor.

An onset date of January 15, 1985, however, is still the proper result. It is true that based on the evidence before the ALJ, a medical advisor should have been obtained. But, as stated in the February 24 opinion, this court reviews the decision of the Appeals Council, not the ALJ. The Appeals Council permitted the record to be supplemented with Dr. Gentry's memorandum. For the reasons discussed in the February 24 opinion, that evidence taken into consideration with the other evidence in the case pointed to only one conclusion, an onset date of January 15, 1985. Since, once Dr. Gentry's memorandum was included in the evidence, there was medical evidence showing the onset date, it was no longer required that a medical advisor be obtained. *See Pugh v. Bowen*, No. 87-2752, slip op. at 15 n.9 (7th Cir. March 20, 1989); *Lichter v. Bowen*, 814 F.2d 430, 434 (7th Cir. 1987). The Secretary could have chosen to also use a medical advisor, but did not. The available evidence supported only one conclusion and therefore the court's February 24 order was appropriate.

IT IS THEREFORE ORDERED that defendant's motion to alter or amend judgment is granted in part and denied in part. The February 24, 1989 memorandum opinion is amended as stated herein. The order and judgment previously entered is not affected.

ENTER:

/s/ William T. Hart
UNITED STATES DISTRICT JUDGE

Dated: MAY 24, 1989